Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO S–01–202 OF 1997

WAN ADNAN CJ (MALAYA), MOHAMED DZAIDDIN AND ABDUL MALEK AHMAD FCJJ

23 MAY 2002

Immigration *— Cancellation of re-entry permit — Right to be heard — Whether the combined effect of the exclusion of the right to be heard provided in s 59 and the ouster clause in s 59A have excluded review in respect of direction by the state authority under s 65(1)(c) — Immigration Regulations 1963 ss 59, 59A, 65(1)(c)*

Immigration *— Cancellation of re-entry permit — Right to be heard — Whether the exclusion of the right to be heard relating to cancellation and revocation of respondent's permit which deprives his right to livelihood was unlawful and unconstitutional — Immigration Regulations 1963 s 59, Federal Constitution arts 5, 8*

The respondent is a Negeri Sembilan born Malaysian who first went to Sabah in August 1975 to work as a teacher. Later, he qualified as a lawyer and since 1985 he has been practising law in the state under a work pass issued to him under reg 16(1) of the Immigration Regulations 1963. As he is not a person belonging to Sabah under s 71(1) of the Immigration Act 1959/63 ('the Act'), he is required to obtain a pass to enter and remain in Sabah under s 66(1) of the Act. Sometime in 1995, he applied for an entry permit, which was granted to him on 27 December 1995 for a period of two years. It is common ground that on the completion of two years, the respondent would be treated as belonging to Sabah under s 71(1) of the Act. However, on 12 November 1997, which was about six weeks before the expiry of the two year period, the respondent was served with a notice of cancellation of entry permit dated the previous day under s 65(1)(c) of the Act. This notice was signed by the Director of Immigration, Sabah ('the director') under the direction of the state authority pursuant to the powers conferred under s 65(1) of the Act. The respondent was granted leave by the High Court to apply for an order of certiorari to quash the decision of the director, but failed to obtain a stay of the cancellation of the entry permit. The stay was subsequently granted by the Court of Appeal. Leave to appeal was granted by this court to determine the following questions of law: (i) whether the combined effect of the exclusion of the right to be heard provided in s 59 of the Act and the ouster clause provided in s 59A of the Act have excluded review in respect of the direction given by the state authority under s 65(1)(c) of the Act on any ground except in regard to any question relating to compliance with any procedural requirement of the act or the regulations governing that act or decision; (ii) whether the provisions of Parts I to VI of the Act in their application to Sabah and Sarawak as a special law shall be read subject to the provisions of Part VII of the Act such that the provisions of Part VII of the Act shall have the effect of prevailing over any

inconsistent provisions of Parts I to VI of the Act in their application to Sabah and Sarawak as a special law; (iii) whether in the exercise of the powers conferred upon the state authority by s 65(1)(c) of the Act to give any directions, it is required to give reasons and if s 65(1)(c) does not require the state authority to give any reasons, whether the court is empowered to examine the reasons furnished by the state authority later in the court proceedings commenced by the respondent to challenge the decision of the state authority; (iv) whether the exclusion of the right to be heard as provided in s 59 of the Act in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprives the respondent his right to livelihood is unlawful and unconstitutional in the light of the express guarantees enshrined in arts 5 and 8 of the Federal Constitution ('the FC'); and (v) whether the amendment effected to s 65(1)(c) of the Act by the Immigration (Amendment) Act 1997 which came into force on 1 February 1997 does not and cannot operate retrospectively so as to prejudice or affect the accrued rights of the respondent, which rights were available to the respondent prior to the said amendment and that alternatively the said amendment is unconstitutional as it contravenes the spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter Governmental Committee 1962 (in particular Ch III).

Held:

(1) It is clear from the explanatory statement that the intention of Parliament in amending s 59A of the Act by providing new provisions is to exclude judicial review by the court of any act done or any decision of the minister or the director general or the state authority under the Act except on grounds of procedural non-compliance of the Act or regulations governing the Act or decision (see p 91H–I); *DR Fraser & Co Ltd v Minister of National Revenue* [1949] AC 24 followed.

(2) Section 59A of the Act is more elaborately expressed and more exclusionary in its scope. Whereas the repealed section provides that an order of the minister, the director general or the state authority under the Act or any subsidiary legislation shall without prejudice to any provisions giving right to appeal to the minister in respect of the order of the director general, be final and shall not be called in question in any court on any ground whatsoever, the language in the present s 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the minister, director general or the state authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para (2) of s 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the

decision maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act (see p 92A–D). A

(3) Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognized. The Court cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of judicial review of an administrative decision (see pp 92E–F, 93H). B C

(4) The combined effect of the exclusion of the right to be heard provided in s 59 of the Act and the ouster clause provided in s 59A thereof have excluded review in respect of the direction given by the state authority under s 65(1)(c) of the Act on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or regulations made thereunder governing that act or decision (see p 94A–B). D

(5) Article 9 cl (3) of the FC provides that so long as under the Constitution any other state is in a special position as compared with the states in Malaya, Parliament may by law impose restrictions, as between that state and other states, on the rights conferred by cl (2) in respect of movement and residence and cl (4) of art 161E have also to be taken into account. Thus it seems clear that the legislature in passing Part VII of the Act was undoubtedly giving effect to the above mentioned terms and art V of the Malaysia Agreement agreed upon between the Federation of Malaya and Sabah. Indeed s 64(1) of the Act employs clear language by the words 'subject to and in accordance with this chapter' meaning that the application of Parts I and VI of the Act are dependent and conditional upon Parts VII. Since Part VII has been provided as a special law, the general provisions of Parts I to VI must give way to the special provisions of Part VII in accordance with the principle of 'generalibus specialia derogant' (see p 97A–C). E F G

(6) The trend of the law has been towards an increased recognition of the duty upon decision makers of many kinds to give reasons. This trend is consistent with the current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis; *R v Royal Borough of Kensington and Chelsea; ex p Grillo* (1996) 28 HLR 94 followed, and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision makers. In considering the words in s 65(1)(c) of the Act, it is clear that there is no express statutory duty H I

imposed on the state authority to give reasons to the respondent (see p 98D–E).

(7) Under s 65(1)(c) of the Act, the state authority is not dealing with the respondent directly but instead is empowered to direct the Director of Immigration to cancel the respondent's entry permit. The power of cancellation would then be exercised by the director pursuant to the direction given by the state authority . It is, of course, not reasonably expected that in giving the direction, the state authority must give reasons to the director. It therefore follows that the director cannot be expected to provide reasons to the respondent since the director is merely carrying out the directions of the state authority. The question of giving reasons by the state authority to the respondent does not arise (see p 98F–H).

(8) Having held that the state authority is not required to give reasons under s 65(1)(c) of the Act, the court is of the view that any reasons furnished by the state authority later in the court proceedings cannot be examined and taken into account, for otherwise the intention of the Legislature in giving the power to the state authority to direct the cancellation of the entry permit would be rendered nugatory. The natural consequence of the examination of the reasons by the court would be that the court may find the reasons unreasonable and the decision to cancel the entry permit made by the director pursuant to the direction of the state authority may then be quashed. This would fly in the face of the arrangements made by Sabah and the Federation of Malaya relating to matters on immigration, one of the terms of participation of Sabah in the new Federation of Malaysia (see p 99A–B).

(9) The entry permit only allows the respondent to enter and reside in Sabah, but ipso facto the entry permit does not confer any right to livelihood to the respondent. The respondent is not a person belonging to the state of Sabah, he could not have been accorded any right to earn a livelihood in that state. Moreover, the state of Sabah's exclusive control on immigration is enshrined in art 161E(4) of the FC. At any rate, the right to set up the practice is only incidental to the right to enter and reside in Sabah (see p 102A–B).

(10) It is clear from the authorities that the constitutional rights as guaranteed under art 5(1) of the FC can be taken away in accordance with law. Hence, s 59 of the Act, which removes the audi alterem partem rule, which was duly enacted by Parliament is valid and constitutional. In view of the presumption of constitutionality of an Act of Parliament and here the burden of showing otherwise is on the respondent which he has not satisfied the court, it is the court's conclusion that s 59 of the Act is valid and constitutional (see p 103D–E).

(11)The respondent could not be said to have any legitimate expectation that his entry permit would not be cancelled given the express provision under the Act that such entry permit may be cancelled at any time. In addition, there was no promise or representation made by the state authority that his entry permit would not be cancelled (see p 105C). A

(12)The spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter-Governmental Committee has not in any way been contravened. The respondent has not shown to the court's satisfaction that the amendment is unconstitutional and since it is trite that a statute is always presumed constitutionally valid until proved otherwise the court therefore rules that the amended s 65(1)(c) of the Act is valid (see p 106B–C), *PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 followed. B C

[Bahasa Malaysia summary D

Responden adalah seorang warganegara Malaysia yang dilahirkan di Negeri Sembilan yang pertama kalinya pergi ke Sabah pada bulan Ogos 1975 untuk bekerja sebagai seorang guru. Beliau kemudianya mendapat kelayakan sebagai seorang peguam dan sejak 1985 telah mengamalkan undang-undang di negeri tersebut di bawah satu pas pekerjaan yang dikeluarkan pada beliau di bawah perkara 16(1) Peraturan-Peraturan Imigresen 1963. Oleh kerana beliau bukannya rakyat Sabah di bawah s 71(1) Akta Imigeresen 1959/63 ('Akta tersebut'), beliau dikehendaki mendapatkan satu pas untuk memasuki dan kekala berada di Sabah di bawah s 66(1) Akta tersebut. Lebih kurang pada tahun 1995, beliau telah memohon untuk mendapatkan satu permit kemasukan, yang diberikan kepada beliau pada 27 Disember 1995 bagi tempoh selama dua tahun. Ianya merupakan alasan biasa bahawa setelah luput dua tahun, responden akan dianggap sebagai rakyat Sabah di bawah s 71(1) Akta tersebut. Walau bagaimanapun, pada 12 November 1997, yang mana adalah lebih kurang enam minggu sebelum luput tempoh dua tahun tersebut, responden telah disampaikan dengan satu notis pembatalan permit kemasukan bertarikh hari yang terdahulu di bawah s 65(1)(c) Akta tersebut. Notis ini telah ditandatangani oleh Pengarah Imigeresen, Sabah ('pengarah tersebut') di bawah arahan pihak berkuasa negeri selaras dengan kuasa-kuasa yang dianugerahkan di bawah s 65(1) Akta tersebut. Responden telah diberi kebenaran oleh Mahkamah Tinggi untuk memohon bagi mendapatkan satu perintah certiorari untuk membatalkan keputusan pengarah, tetapi gagal untuk mendapatkan satu penggantungan pembatalan permit kemasukan tersebut. Penggantungan tersebut telah kemudiannya diberikan oleh Mahkamah Rayuan. Kebenaran untuk merayu telah diberikan oleh mahkamah ini untuk menentukan persoalan undang-undang: (i) sama ada kesan bergabung akan pengecualian hak untuk didengar yang E F G H I

diperuntukkan di dalam s 59 Akta tersebut dan fasal penyingkiran yang diperuntukkan di dalam s 59A Akta tersebut telah mengecualikan kajian semula berhubung dengan arahan yang diberikan oleh pihak berkuasa negeri di bawah s 65(1)(c) Akta tersebut atas sebarang alasan kecuali berhubung dengan sebarang persoalan berkaitan dengan pematuhan sebarang syarat prosedur Akta tersebut atau peraturan-peraturan yang menguasai Akta atau keputusan itu; (ii) sama ada peruntukan-peruntukan Bahagian-Bahagian I hingga VI Akta tersebut dalam pemakaian kepada Sabah dan Sarawak sebagai suatu undang-undang khas akan dibaca tertakluk kepada peruntukan-peruntukan Bahagian VII Akta tersebut demikiannya bahawa peruntukan-peruntukan Bahagian VII Akta tersebut akan mempunyai kesan mengatasi sebarang peruntukan-peruntukan Bahagian I hingga VI Akta tersebut yang tidak konsisten dalam pemakaiannya kepada Sdabah dan Sarawak sebagai satu undang-undang khas; (iii) sama ada dalam melaksanakan kuasa-kuasa yang diberikan ke atas pihak berkuasa negeri oleh s 65(1)(c) Akta tersebut untuk memberikan sebarang arahan, ianya adalah dikehendaki dan jika s 65(1)(c) tidak menghendaki pihak berkuasa negeri memberikan sebarang alasan, sama ada mahkamah diberi kuasa untuk meneliti alasan-alasan yang diberikan oleh pihak berkuasa negeri kemudian dalam prosiding mahkamah yang dimulakan oleh responden untuk mencabar keputusan pihak berkuasa negeri; (iv) sama ada pengecualian hak untuk didengar sepertimana yang diperuntukan dalam s 59 Akta tersebut khususnya perkara-perkara berkaitan dengan pembatalan dan penarikan kembali permit masuk responden yang mana secara berkesannya melucuthak responden kepada mata pencarian adalah salah di sisi undang-undang dan tidak berperlembagaan memandangkan jaminan-jaminan nyata yang termaktub di dalam perkara 5 dan 8 Perlembagaan Persekutuan ('PP tersebut'); (v) sama ada pindaan yang dikuatkuasakan kepada s 65(1)(c) Akta tersebut oleh Akta Imigeresen (Pindaan) 1997 yang mula berkuatkuasa pada 1 Februari 1997 tidak dan tidak boleh beroperasi secara kebelakang hingga memudaratkan atau menjejaskan hak terakru responden, hak yang mana adalah tersedia ada kepada responden sebelum pindaan tersebut dan bahawa secara alternatifnya pindaan tersebut adalah bersifat tidak berperlembagaan kerana ianya melanggari niat dan semangat Agreement Relating to Malaysia 1963 dan Report of the Inter Governmental Committee 1962 (khususnya Bab III).

Diputuskan:

(1) Ianya jelas daripada kenyataan yang bersifat penjelasan bahawa niat Parlimen meminda s 59A Akta tersebut dengan memberikan peruntukan-peruntukan baru adalah untuk mengecualikan kajian semula kehakiman oleh mahkamah akan sebarang tindakan yang dilakukan atau sebarang keputusan Menteri atau Ketua Pengarah atau Pihak Berkuasa Negeri di bawah Akta tersebut kecuali atas

alasan ketidakpatuhan prosedur akan Akta tersebut atau peraturan-peraturan yang menguasai Akta atau keputusan tersebut (lihat ms 91H–I); *DR Fraser & Co Ltd v Minister of National Revenue* [1949] AC 24 diikut. A

(2) Seksyen 59A Akta tersebut dinyatakan dengan lebih teliti dan rapi dan lebih bersifat kekecualian dalam skopnya. Sedangkan seksyen yang dimansuhkan memperuntukkan bahawa sesuatu perintah dari menteri, Ketua Pengarah atau pihak berkuasa negeri di bawah Akta tersebut atau sebarang perundangan subsidiari akan tanpa memudaratkan sebarang peruntukan-peruntukan yang memberi hak untuk merayu kepada Menteri berhubung dengan perintah Ketua Pengarah tersebut, menjadi muktamad dan tidak dipanggil untuk dipersoalkan dalam mana-mana mahkamah atas apa-apa alasan sekalipun, bahasa dalam s 59A semasa adalah jelas berhubung dengan kekecualian kajian semula kehakiman oleh mana-mana mahkamah akan sebarang tindakan atau keputusan yang dibuat oleh Menteri, Ketua Pengarah atau Pihak Berkuasa Negeri di bawah Akta tersebut kecuali bagi ketidakpatuhan akan sebarang syarat prosedur. Kajian semula kehakiman di bawah seksyen tersebut adalah ditakrifkan bagi prosiding yang dimulakan melalui satu permohonan, writ atau sebarang guaman atau tindakan lain yang disebut dalam perenggan (2) s 59A. Dengan sengaja menyebut bahawa tidak akan terdapat kajian semula kehakiman oleh mahkamah akan sebarang tindakan atau keputusan Menteri atau pembuat keputusan kecuali bagi ketidakpatuhan akan sebarang syarat prosedur, parlimen tentunya telah berniat bahawa seksyen tersebut adalah muktamad atas kekecualian kajian semula kehakiman di bawah Akta tersebut (lihat ms 92A–D). B C D E F

(3) Parlimen setelah mengecualikan kajian semula kehakiman di bawah Akta tersebut, ianya adalah tidak dibenarkan bagi mahkamah-mahkamah kami untuk mencelah dan mengganggu suatu keputusan bersifat statutori yang tidak boleh dikaji semula atas dasar suatu bentuk baru yang tidak dapat ditentukan dan konsep yang luas rangkaiannya akan ketidakadilan substantif sebagai suatu alasan berasingan bagi kajian semula kehakiman yang mana mahkamah-mahkamah Inggeris sekali pun menurut undang-undang lazim telah tidak mengiktirafkannya. Mahkamah tidak boleh bersetuju dengan Mahkamah Rayuan bahawa doktrin keadilan substantif boleh diguna sebagai satu alasan berasingan atau tambahan bagi kajian semula kehakiman terhadap suatu keputusan pentadbiran (lihat ms 92E–F, 93H). G H

(4) Kesan bergabung akan kekecualian hak untuk didengar yang diperuntukan dalam s 59 Akta tersebut dan fasal penyingkiran yang diperuntukan di dalam s 59A telah mengecualikan kajian semula berhubung dengan arahan yang diberikan oleh pihak berkuasa negeri di bawah s 65 (1)(c) Akta tersebut atas sebarang alasan kecuali berhubung dengan sebarang soalan berkaitan I

dengan pematuhan sebarang syarat prosedur Akta tersebut atau peraturan-peraturan yang dibuat di bawahnya yang menguasai Akta atau keputusan tersebut (lihat ms 94A–B).

(5) Perkara 9 fasal (3) PP memperuntukkan bahawa asalkan di bawah peruntukan tersebut sebarang negeri lain berada dalam kedudukan istimewa berbanding dengan Negeri-Negeri Tanah Melayu, Parlimen boleh menurut undang-undang mengenakan sekatan, berhubung dengan negeri itu dan negeri-negeri lain, atas hak yang diberikan oleh fasal (2) berhubung pemindahan dan kediaman dan fasal (4) perkara 161E haruslah juga diambilkira. Oleh itu ianya nampak jelas bahawa badan perundangan tersebut dalam meluluskan Bahagian VII Akta tersebut telah tanpa diragui menguatkuasakan terma-terma yang tersebut di atas dan perkara V Perjanjian Malaysia yang telah dipersetujui antara Persekutuan Tanah Melayu dan Sabah. Sesungguhnya s 64(1) Akta tersebut menggunakan bahasa yang nyata dengan perkataan-perkataan 'subject to and in accordance with this chapter' yang bermaksud bahawa pemakaian Bahagian I dan VI Akta tersebut adalah bergantung dan bersyarat ke atas Bahagian VII. Oleh kerana Bahagian VII telah diperuntukan sebagai suatu undang-undang khas, peruntukan-peruntukan am Bahagian-Bahagian I hingga VI semestinya memberi laluan kepada peruntukan-peruntukan khas Bahagian VII berhubung dengan prinsip 'generalibus specialia derogant' (lihat ms 97A–C).

(6) Kecenderungan undang-undang adalah ke arah peningkatan pengiktirafan tugas ke atas pembuat-pembuat keputusan dari pelbagai jenis untuk memberikan alasan-alasan. Kecenderungan ini adalah konsisten dengan pembangunan semasa terhadap sifat keterbukaan yang kian meningkat dalam perkara-perkara kerajaan dan pentadbiran. Tetapi kecenderungan tersebut diteruskan atas dasar setiap satu kes; *R v Royal Borough of Kensington and Chelsea; ex p Grillo* (1996) 28 HLR 94 diikut, dan telah tidak mengenepikan kedudukan mantap undang-undang lazim bahawa tidak terdapat sebarang tugas am, yang secara keseluruhannya dikenakan ke atas semua pembuat-pembuat keputusan. Dalam mempertimbangkan perkataan-perkataan di dalam s 65(1)(c) Akta tersebut, ianya adalah jelas bahawa tidak terdapat tugas statutori nyata yang dikenakan ke atas pihak berkuasa negeri untuk memberikan alasan kepada responden (lihat ms 98D–E).

(7) Di bawah s 65(1)(c) Akta tersebut, pihak berkuasa negeri tidak berurusan dengan responden secara langsung tetapi sebaliknya diberi kuasa untuk mengarahkan Pengarah Imigresen untuk membatalkan permit masuk responden. Kuasa pembatalan akan kemudiannya dilaksanakan oleh pengarah tersebut selaras dengan arahan yang telah diberikan oleh pihak berkuasa negeri. Ianya adalah tentunya tidak secara wajarnya diharapkan bahawa dalam memberi arahan tersebut pihak berkuasa negeri haruslah memberikan alasan kepada pengarah tersebut. Ianya adalah

dengan itu diikuti bahawa pengarah tersebut tidak boleh dijangkakan memberikan alasan kepada responden oleh kerana pengarah hanya menjalankan arahan-arahan pihak berkuasa negeri. Persoalan memberikan alasan-alasan oleh pihak berkuasa negeri kepada responden tidak berbangkit (lihat ms 98F–H). A

(8) Setelah memutuskan bahawa pihak berkuasa negeri tidak dikehendaki memberikan alasan-alasan di bawah s 65(1)(c) Akta tersebut, mahkamah berpendapat bahawa sebarang alasan yang diberikan oleh pihak berkuasa negeri kemudiannya di dalam prosiding mahkamah tidak boleh diperiksa dan diambilkira, kerana sebaliknya niat badan perundangan memberikan kuasa kepada pihak berkuasa negeri untuk mengarahkan pembatalan permit masuk tersebut akan menjadi sia-sia. Akibat semulajadi dari pemeriksaan alasan-alasan tersebut oleh mahkamah adalah bahawa mahkamah mungkin mendapati alasan-alasan tersebut tidak wajar dan keputusan untuk membatalkan permit masuk tersebut yang dibuat oleh pengarah selaras dengan arahan pihak berkuasa negeri mungkin selepas itu dibatalkan. Ini akan menentang pengaturan-pengaturan yang dibuat oleh Sabah dan Persekutuan Tanah Melayu berhubung perkara-perkara imigresen, salah satu terma-terma penyertaan Sabah di dalam Persekutuan Malaysia baru (lihat ms 99A–B). B C D

(9) Permit masuk tersebut hanya membenarkan responden untuk memasuki dan bermastautin di Sabah, tetapi ipso facto permit tersebut tidak memberi sebarang hak untuk mata pencarian kepada responden. Responden bukannya seorang rakyat Negeri Sabah. Beliau tidak boleh diberi sebarang hak untuk dapat mata pencarian di negeri itu. Lagipun, kawalan eksklusif Negeri Sabah ke atas imigresen adalah termaktub di dalam perkara 161E(4) PP. Dalam sebarang keadaan, hak untuk menubuhkan amalan adalah hanya sampingan kepada hak untuk memasuki dan bermastautin di Sabah (lihat ms 102A–B). E F

(10) Ini adalah jelas daripada autoriti-autoriti tersebut bahawa hak perlembagaan seperti yang dijamin di bawah perkara 5(1) PP boleh dikecualikan menurut undang-undang. Oleh itu, s 59 Akta tersebut, yang mengecualikan kaedah audi alterem partem, yang mana telah digubalkan oleh Parlimen adalah sah dan berperlembagaan. Memandangkan tanggapan sifat keperlembagaan sesuatu Akta Parlimen dan di sini beban menunjukkan sebaliknya adalah terletak pada responden yang mana beliau telah tidak laksanakan bagi mahkamah, ianya merupakan kesimpulan mahkamah bahawa s 59 Akta tersebut adalah sah dan perlembagaan (lihat ms 103D–E). G H

(11) Responden tidak boleh diperkatakan sebagai mempunyai sebarang jangkaan sah bahawa permit masuk beliau tidak akan dibatalkan memandangkan peruntukan nyata di bawah Akta tersebut bahawa permit masuk yang sedemikian boleh dibatalkan pada bila-bila I

masa. Tambahan pula tidak terdapat sebarang janji atau representasi yang dibuat oleh pihak berkuasa negeri bahawa permit masuk beliau tidak akan dibatalkan (lihat ms 105C).

(12)Niat dan semangat Agreement Relating to Malaysia 1963 dan Report of the Inter-Governmental Committee telah tidak dalam apa cara pun dilanggar. Responden telah tidak memuaskan hati mahkamah bahawa pindaan tersebut tidak berperlembagaan dan oleh kerana ianya adalah lapuk bahawa sesuatu statut adalah sentiasa dijangka sah disisi perlembagaan sehingga terbukti sebaliknya, Mahkamah dengan itu memutuskan bahawa s 65(1)(c) Akta tersebut yang terpinda adalah sah (lihat ms 106B–C), *PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 diikut.]

Notes

For cases on cancellation of re-entry permit, right to be heard, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) para 3535.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 (refd)

Council of Civil Service Unions and Ors v Minister for the Civil Service [1985] AC 374 (refd)

Datuk Syed Kechik bin Mohamed v Government of Malaysia [1979] 2 MLJ 101 (refd)

DR Fraser & Co Ltd v Minister of National Revenue [1949] AC 24 (folld)

Edwards v Bairstow [1956] AC 14 (refd)

Government of Malaysia & Anor v Selangor Pilot Association [1977] 1 MLJ 133 (refd)

Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33 (refd)

Government of the Federation of Malaysia v Surinder Singh Kanda [1961] 27 MLJ 121 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (refd)

JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Marta Stefan v General Medical Council [1999] 1 WLR 1293 (refd)

Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243 (refd)

PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (folld)

PP v Su Liang Yu [1976] 2 MLJ 128 (refd)

PP v Yee Kim Seng [1983] 1 MLJ 252 (refd)

Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors [1960] AC 260 (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
R v Royal Borough of Kensington and Chelsea; ex p Grillo (1996) 28 HLR 94 (folld)
S Kumasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204 (refd)
Stephens v Cuckfield Rural District Council [1960] 2 QB 373 (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78
Federal Constitution arts 5(1), 7, 8(1), 9(2), (3), 10, 11, 12, 13(1), 159(3), 161E(2), (4)
Immigration Act 1959/63 ss 1(2), 9(1)(c), 14, 59A, 64(1), 65(1)(c), 66(1), 71(1)
Immigration (Amendment) Act 1997 s 59A
Immigration Ordinance 1959
Immigration Regulations 1963 regs 16(1), 19
Internal Security Act 1960
Malaysia Act 1963 s 60(1), (2)
Port Authorities Act 1963 s 35A
Port Authorities (Amendment) Act 1972

Appeal from: Civil Appeal No S–01–202 of 1997 (Court of Appeal, Kuala Lumpur)

Stephen Foo Kiat Shim (*Athmat bin Hassan* with him) (*Peguam Besar Negeri Sabah*) for the appellant.

Muhammad Shafee Abdullah (*Rajasegaran K* with him) (*Sugumar & Co*) for the respondent.

Mohamed Dzaiddin FCJ (delivering judgment of the court): Both appeals arose from the decision of the Court of Appeal given on 17 June 1998 which allowed an appeal of Sugumar Balakrishnan, the respondent herein, against the decision of Ian Chin J of the High Court Kota Kinabalu made on 26 December 1997 dismissing his application for an order of certiorari to quash the Director of Immigration Sabah's notice of cancellation of entry permit and its decision to cancel the respondent's entry permit dated 12 November 1997 (the state authority Sabah is the appellant in Appeal No 01–1–99 and Sugumar is the appellant in Appeal No 01–2–99. Hence, reference to parties herein is according to Appeal No 01–1–99).

Factual background

The respondent is a Negeri Sembilan born Malaysian who first went to Sabah in August 1975 to work as a teacher. Later, he qualified as a lawyer and since 1985 he has been practising law in the state under a work pass issued to him under reg 16(1) of the Immigration Regulations 1963. As he is not a person belonging to Sabah under s 71(1) of the Immigration Act 1959/63 ('the Act'), he is required to obtain a pass to enter and remain in Sabah under s 66(1) of the Act. Sometime in 1995, he applied for an entry permit which was granted to him on 27 December 1995 for a period of two years. It is common ground that on the completion of two years, the respondent would be treated as belonging to Sabah under s 71(1).

However, on 12 November 1997, which was about six weeks before the expiry of the two year period, the respondent was served with a notice of cancellation of entry permit dated the previous day under s 65(1)(c) of the Act. This notice was signed by the Director of Immigration Sabah ('the director') under the direction of the state authority pursuant to the powers conferred under s 65(1) of the Act. The notice states as follows:

> NOTICE OF CANCELLATION OF ENTRY PERMIT
>
> Section 65(1)(c) Immigration Act 1959/63 (Amended 1997)
>
> To: Sugumar Balakrishnan of Kota Kinabalu.
>
> Whereas you, Sugumar Balakrishnan NRIC No 4548121, have been granted entry permit to reside in Sabah vide Ref No CIM/EP/21072 issued on 27 December 1995 at Kota Kinabalu.
>
> NOW, KNOW YOU, that I, Abdullah Sani bin Sulaiman, State Director of Immigration, Sabah by virtue of the directive by the state authority of Sabah under s 65(1)(c) of the Immigration Act 1959/63 do hereby forthwith cancel the entry permit issued to you and your presence in the state of Sabah is declared unlawful.
>
> Upon receiving this order you are summoned to appear at the Immigration Office, 6th Floor, Wisma Dang Bandang, Kota Kinabalu, Sabah on or before 18 November 1997 for further action.
>
> Signed
>
> (ABDULLAH SANI SULAIMAN)
> DIRECTOR OF IMMIGRATION,
> STATE OF SABAH
>
> Dated this: 11 November 1997.

At the same time, the respondent was also served with a copy of a special pass which allowed him to remain in Sabah for seven days.

On 17 November 1997, the respondent was granted leave by the High Court to apply for an order of certiorari to quash the decision of the director dated 12 November 1997, but failed to obtain a stay of the cancellation of the entry permit. The stay was subsequently granted by the Court of Appeal. In the meantime, the state authority was allowed to join as a party to the substantive motion.

On 26 December 1997, Ian Chin J dismissed the respondent's motion with costs and held:

(1) that any challenge to the act or direction given to the director by the state authority under s 65 of the Act cannot be questioned by the court because it is caught by the privative clause in s 59A except for questions relating to compliance with procedural requirements of the Act or regulations governing those acts or decisions;

(2) that there is a proviso in s 64(1) that the operation of s 14 shall be subject to and in accordance with Cap 2 of Part VII, which means that s 14 must be read subject to ss 62–74 of the Act. Therefore, by cancelling the respondent's entry permit under s 65 instead of s 14, the director had not committed an error of law;

(3) that s 59 of the Act, as amended, provides that any order of the state authority does not require the giving of an opportunity to be heard. In this case, the director has no discretion but to cancel the entry permit as directed by the state authority. Hence, the act or the decision of the director also enjoys the exclusion of the right to be heard;

(4) in addition, since the cancellation was done in accordance with the law, there is no question of s 59 violating arts 5(1) or 8(1) of the Federal Constitution;

(5) that by virtue of ss 59 and 59A there is no duty on the director to give any reasons for cancelling the respondent's entry permit.

Proceedings in the Court of Appeal

The Court of Appeal on 17 June 1998 allowed the appeal, set aside the order of the trial judge and ordered that certiorari be issued to remove and quash the cancellation of the respondent's entry permit.

The approach of the Court of Appeal in dealing with the appeal, as stated in the judgment of Gopal Sri Ram JCA, seems to be this. His Lordship felt that it was sufficient to dispose of the appeal by considering two matters. First, with regard to the learned judge's conclusion that there had been no error of law. Secondly, the duty upon a public decision maker to act fairly, and in this context, the doctrine applies to the facts of the instant case. His Lordship however found it necessary to deal with some points which he considered are relevant to the case. The first point is on the effect of s 59A and its applicability to the director. For reasons stated by his Lordship which we will discuss later, he was of the view that s 59A could not and did not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the act both on substantive as well as procedural grounds.

Secondly, his Lordship considered ss 9(1)(c), 59 and 65(1)(c) of the Act which were cited by counsel during argument. On s 9(1)(c), his Lordship considered the meaning of the words 'if he is satisfied' and 'morality' appearing therein. Relying on the well established authority of *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243, his

A Lordship stated that the satisfaction to which the section refers is objective and not subjective. After discussing the principle of legislative intention and relying on two Indian cases and an Australian High Court decision, his Lordship held that the word 'morality' means 'public morality' and not the private or personal morality of an individual.

B On s 59, he noted that the language in which the section has been couched shows that it is the intention of Parliament to do away with the audi alterem partem rule. In his view, the rules of natural justice are a flexible concept whose categories are not closed and that they merely form part of a wider doctrine of the duty to act fairly.

C On s 65(1)(c) he agreed with the interpretation given by the learned High Court judge that there is no residual discretion on the director and therefore the act or decision of the director following a direction of the state authority is really the act or decision of the latter. His Lordship also questioned whether s 65(1) gives untrammelled power under the Act to the state authority to direct the cancellation of an entry permit. He answered in D the negative.

It is now important to summarize the reasons of the Court of Appeal in allowing the appeal (see *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289). According to Gopal Sri Ram JCA (at p 303), two matters are sufficient to dispose of the [first] appeal. The first E point was whether or not there was an error of law. The second concerns the duty upon a public decision maker to act fairly and the application of that doctrine to the facts of the present case. His Lordship began by considering s 9(1)(c), where during the argument before the learned High Court judge, it was on record that the learned State Attorney General drew the attention of the court to the section and informed the learned judge that F he was relying on it. Yet, the learned judge went on to decide the matter based on s 14 without giving any reason why he rejected that s 9(1)(c) was applicable. However, since his Lordship had earlier held that the state authority must act in accordance with s 9(1)(c) when exercising its power to direct the director under s 65(1), he was therefore of the view that the learned High Court judge misdirected himself in law when he failed to give G any regard to the provisions of s 9(1)(c) of the Act.

Next, his Lordship found that the learned trial judge had approached narrowly the question whether the decision to cancel the entry permit was vitiated by an error of law. His Lordship referred to two passages in the High Court judgment which demonstrated this narrow approach of the H learned trial judge. He stated that an error of law in the context of public law is a broad concept. It is not limited to a mere misconstruction by a public decision-maker of the provision of the empowering statute. His Lordship also noted that the learned judge did not appear to have evaluated the affidavit evidence presented to him and failed to address his mind to the evidence led before him. In the result, his Lordship formed an opinion that I the validity of the cancellation of the entry permit should be examined against s 9(1)(c) of the Act. In light of the section, he proceeded to examine the affidavit of Datuk Ghulam Jelani bin Khanizaman which showed the

considerations that were taken into account in exercising the power to cancel the respondent's entry permit. Based on this affidavit, his Lordship arrived at the following conclusions: A

(1) that the reasons disclosed in Datuk Ghulam Jelani's affidavit are open to curial scrutiny;

(2) that upon examination, it is found that the respondent's entry permit was directed to be cancelled because of his private morals; B

(3) that such consideration is not one of those prescribed by s 9(1)(c) of the Act pursuant to which provision the state authority admittedly acted; and

(4) that in the result the decision to cancel the respondent's entry permit was not in accordance with law. C

On the second point, ie the duty to act fairly, his Lordship observed that the judgment of the learned trial judge made it plain that he was of the view that s 65 is a special provision uncontrolled by any of the other provisions in the Act. His Lordship continued at p 320: D

> It must then logically follow that a state authority of an East Malaysian state has unfettered power to regulate immigration within its borders. The judgment, when read as a whole, certainly conveys the impression that such a conclusion appealed to the judge as being correct in law. Regrettably, however, we must enter our most vigorous dissent against such a proposition. While the East Malaysian states have certain rights and privileges reserved unto them by the Federal Constitution, particularly in matters pertaining to immigration, they, like the Federal Government and the Government of any of the West Malaysian states, are bound by the terms of the Federal Constitution. Indeed, there is none within the shores of Malaysia who is ever so high that the supreme law is not above him. Every public decision maker, including the state authority of an East Malaysian state is accordingly under a duty to observe the provisions of the Federal Constitution. And it is an elementary principle of our constitutional law that no Act of Parliament may authorize a public decision maker to act contrary to the supreme law. E F
>
> Article 8(1) of the Federal Constitution strikes at the heart of arbitrariness in public decision making and imposes a duty upon a public decision maker to act fairly (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261]). The second respondent before us is no different from any other public decision maker. It too is under a duty to act fairly in exercising the powers conferred upon it by the Act. G

Following his general observation on the duty to act fairly, his Lordship discussed the recent development in administrative law as a result of the landmark decision of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. His Lordship stated at p 323: H

> The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognized to comprise two limbs: procedural fairness *and* substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision maker to arrive I

A at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance. (Emphasis added.)

B In the context of the present case, his Lordship concluded at p 323:

> Although the learned judge referred to *Rama Chandran* in his judgment, he did not, as will appear in a moment, sufficiently appreciate the wealth of public law jurisprudence flowing from the majority judgments in that case. Indeed, the learned judge entirely missed the issue central to the case and canvassed at length before him by the appellant's counsel. It therefore behoves
> C us to address the point fully and deal with the application of the doctrine of fairness to the present instance.

His Lordship went on to deal with the applicability of the doctrine of fairness in the instant case. He found it desirable to consider both the procedural and substantive aspects, although he was fully conscious that in
D the instant case the procedural limb was not strictly necessary. However, what prompted him to do so was because of the views expressed by the learned trial judge on the duty to give reasons. So, his Lordship's finding was this (pp 325–326):

> Fourth and last, we are in agreement with so much of the learned judge's judgment that holds that the first respondent need not furnish reasons for
> E cancelling the appellant's entry permit. Where we part company with the learned judge is the grounds he has advanced for his conclusion. In our judgment, neither s 59 nor s 59A have the effect of excluding the duty to give reasons. As we have earlier said, all that s 59 does is to deprive an aggrieved person of the benefit of the audi alteram partem rule. Upon its language, it certainly has no effect upon other facets of the duty to accord procedural
> F fairness, including the duty to give reasons. Similarly, s 59A is an attempt to immunize decisions made under the Act. It has not the effect the learned judge thought it had. In our judgment, the true principle upon which the first respondent ought not to be required to furnish reasons in a case under s 65 of the Act is that he is a mere amanuensis of the second respondent. Even if he does furnish reasons, all he can say is that he acted in accordance with the
> G direction given him by the second respondent. Since we already know this from the terms of s 65, it becomes unnecessary for the court to look to the first respondent for his reasons. But we must say in all fairness to the first respondent that the incumbent to that office did in fact file an affidavit in the court below in which, apart from making some very general statements, he says he cancelled the appellant's entry permit because he was directed to do so by the second respondent.

H On substantive fairness, his Lordship held that the learned judge erred in not considering, where there was material before him, whether the decision to cancel the respondent's entry permit was substantively fair. His Lordship approached this issue of substantive fairness in the following manner. The question that fell for determination was whether a reasonable state authority
I would have directed the cancellation of the respondent's entry permit on the basis of the facts upon which the state authority had acted. Having regard to the objective facts of the case, his Lordship answered in the

negative. His Lordship also rejected the submission of the learned State Attorney General that based on policy considerations it was entirely a matter for the state authority to decide the kind of persons who should be permitted to belong to the state of Sabah under s 71 of the Act. According to his Lordship, the state authority must exercise its powers in accordance with the articles in the Federal Constitution which confer fundamental liberties. In the result, he held that the decision of the state authority to direct the cancellation of the respondent's entry permit was not substantively fair.

For reasons which we have summarized above, the Court of Appeal allowed the respondent's appeal on 17 June 1998 and ordered that certiorari be issued to remove and quash the cancellation of the respondent's entry permit.

Appeals to the Federal Court

Both sides lodged separate appeals against the judgment of the Court of Appeal. Leave to appeal was granted by this court on 3 May 1999 to determine the following questions of law:

(i) whether the combined effect of the exclusion of the right to be heard provided in s 59 of the Act and the ouster clause provided in s 59A of the said Act has excluded review in respect of the direction given by the state authority under s 65(1)(c) of the Act on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or the regulations governing that Act or decision;

(ii) whether the provisions of Parts I to VI of the said Act in their application to Sabah and Sarawak as a special law shall be read subject to the provisions of Part VII of the Act such that the provisions of Part VII of the said Act shall have the effect of prevailing over any inconsistent provisions of Parts I to VI of the said Act in their application to Sabah and Sarawak as a special law;

(iii) whether in exercise of the powers conferred upon the state authority by s 65(1)(c) of the Act to give any directions, it is required to give reasons and if s 65(1)(c) does not require the state authority to give any reasons, whether the court is empowered to examine the reasons furnished by the state authority later in the court proceedings commenced by the respondent to challenge the decision of the state authority;

(iv) whether the exclusion of the right to be heard as provided in s 59 of the Act, in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprives the respondent his right to livelihood, is unlawful and unconstitutional in the light of the express guarantees enshrined in arts 5 and 8 of the Federal Constitution;

(v) whether the amendment effected to s 65(1)(c) of the Act by the Immigration (Amendment) Act 1997 which came into force on the

A 1 February 1997 does not and cannot operate retrospectively so as to prejudice or affect the accrued rights of the respondent, which rights were available to the respondent prior to the said amendment, and that alternatively the said amendment is unconstitutional as it contravenes the spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter Governmental Committee
B 1962 (in particular Ch III).

Proceedings in this court

Before us, the arguments of counsel proceeded in numerical order of the above five questions of law and reliance was placed on the respective oral
C and written submissions.

Question no 1

The primary submission of the learned State Attorney General Datuk Foo is that s 59A of the Act has effectively excluded any judicial review from the
D jurisdiction of the courts in respect of any act or decision of the state authority made under the Act except on the question relating to any compliance with any procedural requirement of the Act or any regulations governing that act or decision. He pointed out that under s 65(1)(c), no procedural requirement is provided for the state authority to comply with
E before giving directions to the director. As such, there was no non-compliance of any procedural requirement by the state authority and accordingly, s 59A applied in the present case. Datuk Foo further contended that the fact that s 59A was amended in 1997 replacing the former s 59A with a wider ouster clause clearly shows that the legislative intention was to deliberately exclude the act or decision of the minister or
F the director general or in the case of an East Malaysian state, the state authority, from judicial review except in respect of non-compliance with any procedural requirement under the Act or regulations. He submitted that the Court of Appeal was wrong in ignoring the clear wording of s 59A which has ousted the jurisdiction of the court in respect of certiorari proceedings questioning the decision of the state authority under the Act. Moreover,
G Parliament may also by clear words exclude the principles of natural justice, eg the right to be heard (*S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204). Therefore, the Court of Appeal erred in going against the basic principles of interpretation.

Next, Datuk Foo submitted that the Court of Appeal was wrong in
H holding that the right to seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5(1) of the Federal Constitution. This was contrary to the decision of the Federal Court in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 (per Suffian LP at pp 34–35) that art 5(1) speaks of personal liberty, not liberty simpliciter and refers to rights relating to the
I person or body of the individual and does not include the right to travel overseas and to a passport. Besides, art 5(1) is not an absolute prohibition but permits deprivation of life or personal liberty in accordance with law.

For the above proposition, the learned State Attorney General relied on *PP v Yee Kim Seng* [1983] 1 MLJ 252 at p 253 and *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133 at p 135.

The last important submission on this issue is that judicial review through supervisory jurisdiction may also be excluded by legislation passed by Parliament as in s 59A of the Act. Datuk Foo relied on *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 (per Edgar Joseph Jr J (as he then was)) at p 488 which held that the High Court can review the decision of public authorities and inferior tribunals unless there is express statutory direction to the contrary. In *Rama Chandran* at p 191, Edgar Joseph Jr FCJ stated that:

> It is clear law that *appellate* review jurisdiction is solely a creature of statute while *supervisory* review jurisdiction is the creature of common law and is available in the exercise of the courts' *inherent* power but, I would hasten to add, its extent may be determined not merely by judicial development but *also by legislative intervention.* (Emphasis added.)

In response, En Muhammad Shafee reaffirmed the proposition of law laid down by the Court of Appeal that judicial review is a basic and essential feature of the Federal Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is excluded, the Federal Constitution will cease to have effect and the constitutional and legal protection afforded to the citizen would become illusory. Thus, the essence of the Court of Appeal judgment, according to counsel, is that any decision of an inferior tribunal or any public decision maker will not be immunized from judicial review by an ouster clause however widely drafted. Counsel referred to the judgment of the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 at p 45 (per Edgar Joseph Jr FCJ) that:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts.

En Shafee referred us also to de Smith, Woolf & Jowell on *Judicial Review of Administrative Action* (5th Ed), on the effect of ouster clauses, pp 252–253:

> Where a statute seeks to oust the jurisdiction of the courts to review the decisions of an inferior body, there is a compelling inference that parliament did not intend that body to be the final arbiter of its own powers. There is therefore a presumption that any error of law committed by that body is reviewable, whether or not the error is one of jurisdiction in the narrow sense.

The issue here is whether the combined effect of ss 59 and 59A has removed the powers of judicial review of the court in respect of the direction by the state authority under s 65(1)(c) of the Act. The wider issue is whether statutory provisions of the type stipulated in s 59A can preclude the court

from exercising its powers of judicial review over the decision of public decision makers. The Court of Appeal said it cannot.

We shall now examine ss 59 and 59A of the Act. Section 59 states that no person and no member of a class of persons shall be given an opportunity of being heard before the minister or the director general makes any order against him in respect of any matter under the Act. The section was amended to include the state authority of the East Malaysian states.

Next, s 59A (before its amendment) reads as follows:

> An order of the Minister or the Director General under this act or any subsidiary legislation made under this act shall (without prejudice to any provisions giving a right to appeal to the Minister in respect of an order of the Director General) be final and shall not be called in question in any court on any ground whatsoever.

The section was replaced with a new section by the Immigration (Amendment) Act 1997 (Act A 985) with effect from 1 February 1997 which reads:

> Exclusion of judicial review 59A
>
> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this act except in regard to any question relating to compliance with any procedural requirement of this act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of —
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (c) any writ of habeas corpus; or
>
> (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this act.

The explanatory statement to the bill, which is an aid to interpretation, states that the new s 59A seeks to provide for the exclusion of judicial review in any court of any act done or any decision made by the minister or the director general, or in the case of an East Malaysian state, the state authority under the Act save for questions on procedural compliance. It is also to be noted that there is a marginal note to the section which reads: 'Exclusion of judicial review'. 'While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind' (*Stephens v Cuckfield Rural District Council* [1960] 2 QB 373 at p 383). Thus, it is clear from the explanatory statement that the intention of Parliament in amending s 59A by providing new provisions is to exclude judicial review by the court of any act done or any decision of the minister or the director general or the state authority under the Act except on grounds of procedural non-compliance of the Act or regulations governing the act or decision. In *DR Fraser And Company, Limited v Minister*

of National Revenue [1949] AC 24 at p 33, Lord MacMillan in giving the opinion of the Judicial Committee of the Privy Council said: A

> When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately.

Secondly, in our view, s 59A is more elaborately expressed and more exclusionary in its scope. Whereas the repealed section provides that an order of the minister, the director general or the state authority under the Act or any subsidiary legislation shall without prejudice to any provisions giving right to appeal to the minister in respect of the order of the director general, be final and shall not be called in question in any court on any ground whatsoever, the language in the present s 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the minister, director general or the state authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para (2) of s 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the decision maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act. B C D

We pause to note here that the Court of Appeal seems to introduce the doctrine of substantive fairness as a separate ground in its review of the administrative decision of the state authority under the Act by invoking art 8(1) read together with art 5(1) of the Federal Constitution. The Court also relied on *Rama Chandran*, see pp 320 and 323. E

In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognized. We are aware of the many facets of the concept of procedural fairness in common law which our courts have for decades adopted, and we are aware of the consideration of fairness that has to be taken into account in relation to grounds for judicial review relating to 'irrelevancy' as part of the 'illegality' ground and to 'irrationality' as arising from the '*Wednesbury* unreasonableness' ground. As was stated by Edgar Joseph Jr FCJ in *Rama Chandran* when he observed that courts can scrutinize decisions not only for process, but also for substance, and he certainly was not putting forward a new head for judicial review when he stated, at pp 186–187: F G H

> It is often said that judicial review is concerned not with the decision but the decision making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions and Ors v Minister for the Civil* I

Service [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for substance.

In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:

> 'By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could arrive at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or less there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

For the above reasons, we cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of judicial review of an administrative decision. Here, on a clear wording of s 59A, in our view, Parliament must have intended to conclusively exclude judicial review except on procedural defect under the Act or regulations made thereunder. In the words of Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors* [1960] AC 260 at p 286:

> It is a principle nor by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.

Our answer to question no 1 is therefore that the combined effect of the exclusion of the right to be heard provided in s 59 of the said Act and the ouster clause provided in s 59A thereof has excluded review in respect of the direction given by the state authority under s 65(1)(c) on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or regulations made thereunder governing that act or decision.

Question no 2

This question arose from the finding of the Court of Appeal on the interpretation of s 65(1)(c) which comes under Part VII of the Act. In the opinion of Gopal Sri Ram JCA, the section did not expressly set out the circumstances for the state authority to direct the director to exercise his power of cancellation. Parliament did not intend to confer an untrammelled power on the state authority to direct the cancellation of an entry permit. That legislative intent was evidenced by the opening words of s 65(1)(c), which say 'In exercising his powers under Parts I to VI', thereby referring to the sections in Parts I to VI, among these being s 9(1)(c) which circumscribes the power of cancellation. Therefore, in the context of an East Malaysian state, the statutory preconditions in s 9(1)(c) mutatis mutandis govern the cancellation of an entry permit by the state authority, and it follows that the state authority in giving directions to cancel the permit must act within the scope of s 9 of the Act.

In our view, the question to be answered here is quite straightforward, viz whether the provisions in Part VII, being a special law, have the effect of prevailing over any inconsistent provisions in Parts I to VI in their application to Sabah and Sarawak.

The crux of Datuk Foo's submission is that Part VII of the Act is a special law for East Malaysia and in its application to Sabah and Sarawak, the provisions in Part VII shall have the effect of prevailing over or overriding the inconsistent provisions in Parts I to VI. He reasoned that s 1(2) clearly provides that the Act shall apply throughout Malaysia subject to Part VII. He cited s 64(1) which states as follows:

> Without prejudice to the general operation of Parts I to VI (in East Malaysia as in West Malaysia), as a general law for Malaysia as a whole, those Parts shall also have effect, subject to and in accordance with this chapter, as a special law for each of the East Malaysian States as if for any reference to Malaysia (except in a reference to a Government in Malaysia) there were substituted a reference to the East Malaysian State.

He submitted that the section enabled Parts I to VI to be applicable to Sabah and Sarawak as a separate unit for immigration purposes, but subject to and in accordance with Part VII as a special law for each of the East Malaysian states. Datuk Foo laid stress on the words 'subject to' by relying

on the judgment of Neal J in *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] 27 MLJ 121 at p 138:

> To test the conclusion to which I have come by following the method of approach adopted by the Attorney General in his argument and endeavouring to give to the words, 'subject to,' their ordinary meaning ... 'subject to' must mean from that point of view 'swallowed up' or 'negatived by'.

It was also pointed out that s 66(1) provides that where a citizen is not entitled to enter an East Malaysian state under s 66(1), Parts I to VI in their operation as a special law for the East Malaysian state shall apply to him as if he was not a citizen. The respondent here is such a person.

Datuk Foo contended that in construing the provisions in Part VII, as a special law for the East Malaysian states, consideration must be had to the objectives and background history of Part VII which concerned additional provisions regarding entry into Sabah and Sarawak under the Malaysia Agreement.

In this regard, we note that Part VII originated from the Immigration Act 1963, later revised and incorporated into the present Act 1959/63 in 1975. The 1963 Act was passed on the formation of Malaysia in September 1963. The Bill for the 1963 Act was annexed to the Malaysia Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore. Article V of the Malaysia Agreement states:

> The Government of the Federation of Malaya will take such steps as may be appropriate and available to them to secure the enactment before Malaysia Day by the Parliament of the Federation of Malaya of an Act in the form set out in Annex E to this Agreement for the purpose of extending and adapting the Immigration Ordinance 1959, of the Federation of Malaya to Malaysia and of making additional provision with respect to entry into the states of Sabah and Sarawak; and the other provisions of this agreement shall be conditional upon the enactment of the said act.

The State Attorney General concluded that s 65(1)(c) which comes under Part VII of the Act as special provisions for Sabah and Sarawak prevailed over the inconsistent provisions in Parts I to VI. As such, the director had no alternative but to comply with the direction to cancel any permit issued to a specified person given to him by the state authority. Therefore, the Court of Appeal was wrong to hold that the appellant in giving directions to the director to cancel the respondent's entry permit must follow the provisions of s 9 of the Act.

In our opinion, there is much force in the submission of the learned State Attorney General that Part VII as a special law for East Malaysia prevails over the inconsistent provisions in Part I to VI of the Act.

This was one of the terms of participation of Sabah and Sarawak in the new Federation of Malaysia as could be seen from the Report of the Inter-Governmental Committee which states inter alia:

> 16 Immigration
>
> The following arrangements should apply:

(a) immigration into Malaysia should remain on the Federal List, but legislation should be enacted by the Federal Parliament to ensure that, except as provided in sub-paragraph (f) below, entry into the Borneo States will require the approval of the State concerned;

(b) ...

(c) the Federal Government should undertake in the formal agreement for the establishment for Malaysia to pass before Malaysia Day a law coming into operation on Malaysia Day, the draft of which would be agreed by the Governments of the Borneo States and scheduled to the formal agreement and an outline of which is set out in sub-paragraph below;

(d) ...

(e) ...

(f) the law referred to in sub-paragraph (c) should contain provisions to secure that:

(i) any person from outside Malaysia whose entry into a Borneo State the Government of that state considers is necessary for State purposes shall be given entry except in cases where the Federal Government, which will be consulted for this purpose, considers that it is desirable in the national interest that entry should be refused;

(ii) subject to art 9(1) and to sub-paragraph (iv) below, admission to a Borneo State will not be granted to any other person or class of persons whether from inside or outside Malaysia, without the approval of the government of the State concerned;

(iii) subject to art 9(1) and to sub-paragraph (iv) below, any person who is present in a Borneo State contrary to the provisions of sub-paragraph (ii) above or whose presence is otherwise unlawful, whom the government of the State wishes to be removed from the state, shall be so removed;

(iv) the provisions outlined in sub-paragraph (ii) and (iii) above do not apply to members officers of the Federal Government or any person or class of persons whose temporary presence in the state the Federal Government, after consultation with the State Government, considers is necessary in order to enable the Federal Government to carry out its constitutional and administrative responsibilities ...'

(v) ...; and

(g) ...

In dealing with Part VII of the said Act, one must not forget the constitutional recognition under cl (3) of art 9 of the Federal Constitution relating to the special position of Sabah and Sarawak where Parliament may impose restrictions. While cl (2) of art 9 of the Federal Constitution provides that every citizen has the right to move freely throughout the Federation and to reside in any part thereof, this clause is made subject, inter alia, to cl (3).

Clause (3) was added to art 9 with effect from Malaysia Day, 16 September 1963 by s 60(1) of the Malaysia Act 1963. Under s 60(2), the

said cl (3) 'shall apply to laws passed before Malaysia Day so as to impose restrictions with effect from Malaysia Day'.

The said cl (3) provides that so long as under the Federal Constitution any other state is in a special position as compared with the states in Malaya, Parliament may by law impose restrictions, as between that state and other states, on the rights conferred by cl (2) in respect of movement and residence, and cl (4) of art 161E also has to be taken into account.

Thus, it seems clear to us that the legislature in passing Part VII was undoubtedly giving effect to the above mentioned terms and art V of the Malaysia Agreement agreed upon between the Federation of Malaya and Sabah. Indeed s 64(1) referred to by the learned State Attorney General employs clear language by the words 'subject to and in accordance with this chapter' meaning that the application of Part I and VI is dependent and conditional upon Part VII. Since Part VII has been provided as a special law, the general provisions of Parts I to VI must give way to the special provisions of Part VII in accordance with the principle of '*generalibus specialia derogant*'.

For the above reasons, we hold that the provisions in Part VII prevail over any inconsistent provisions in Parts I to VI in their application to Sabah and Sarawak as a special law.

Question no 3

The Court of Appeal found that reasons have indeed been given in this case and once reasons are given by a public decision maker for his decision, they may be examined by the court. The learned State Attorney General submitted that there was no requirement under s 65(1)(c) of the Act for the state authority to give reasons for its decision.

Section 65(1)(c) of the Act provides:

> In exercising his powers under Parts I to VI as a special law for an East Malaysian State the director shall comply with any directions given to him by the State Authority, being directions—
>
> (a) ...;
>
> (b) ....; or
>
> (c) requiring him to cancel any permit, pass or certificate issued to a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

Datuk Foo contended that this is not a case where a fundamental liberty of a person guaranteed by the Federal Constitution is adversely affected in consequence of a decision. He submitted that the reasons given by Datuk Gulam Jelani in his affidavit were irrelevant and the Court of Appeal was therefore wrong to take those reasons into consideration.

For the respondent, it was argued that the state authority is under a duty to give reasons in the present case where the right to livelihood is involved. Encik Shafee cited the case of *Majlis Perbandaran Pulau Pinang v*

Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan to support the contention that the state authority is under the duty to give reasons. Speaking for the Federal Court, Edgar Joseph Jr FCJ cited the case of *Marta Stefan v General Medical Council* [1999] 1 WLR 1293 as follows:

> After dealing with the question whether there was an express or implied statutory obligation in the relevant legislation for the Committee to state reasons for decision, their Lordships concluded that there was no express statutory duty to state reasons for its decision nor were they able to spell out an implied obligation to state reasons.
>
> Nevertheless their Lordships found that the Committee had the power to give reasons and added:
>
> > that giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reason for finding against him; (2) where guidance can usefully be provided to the profession especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process ...
>
> The trend of the law has been towards an increased recognition of the duty upon decision makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (*R v Royal Borough of Kensington and Chelsea; ex p Grillo* (1996) 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision makers.

In considering the words in s 65(1)(c), it is clear that there is no express statutory duty imposed on the state authority to give reasons to the respondent. Insofar as the common law position is concerned, we adopt the proposition that was stated in *Marta Stefan* that the trend of the law is towards giving reasons, but on a case by case basis. However, the trend has not lost sight of the established position of the law that there is no general duty universally imposed on all decision makers. Under s 65(1)(c), the state authority is not dealing with the respondent directly but instead is empowered to direct the Director of Immigration to cancel the respondent's entry permit. The power of cancellation would then be exercised by the director pursuant to the direction given by the state authority. It is of course not reasonably expected that in giving the direction the state authority must give reasons to the director. It therefore follows that the director cannot be expected to provide reasons to the respondent since the director is merely carrying out the directions of the state authority. That being so, we agree with the submission of the learned State Attorney General that the question of giving reasons by the state authority to the respondent does not arise. Accordingly, we hold that in exercise of the powers conferred upon the state authority by s 65(1)(c) of the Act, the state authority is not required to give reasons. Since reasons have indeed been given in this case, we now need to consider whether the court is empowered to examine the reasons furnished by the state authority later, vide the affidavit of Datuk Gulam Jelani filed in the proceedings commenced by the respondent to challenge the decision of the state authority.

Having held that the state authority is not required to give reasons under s 65(1)(c) of the Act, it is our view that any reasons furnished by the state authority later in the court proceedings cannot be examined and taken into account, for otherwise the intention of the legislature in giving the power to the state authority to direct the cancellation of the entry permit would be rendered nugatory. The natural consequence of the examination of the reasons by the court would be that the court may find the reasons unreasonable and the decision to cancel the entry permit made by the director pursuant to the direction of the state authority may then be quashed. This would fly in the face of the arrangements made by Sabah and the Federation of Malaya relating to matters on immigration, one of the terms of participation of Sabah in the new Federation of Malaysia. To recapitulate, one of the arrangements was '... admission to a Borneo State will not be granted to any other person or class of persons, whether from inside or outside Malaysia, without the approval of the government of the state concerned' and that 'any person ... whose presence is otherwise unlawful, whom the government of the state wishes to be removed from the state, shall be so removed'.

Our answer to question no 3 is that the state authority is not required to give reasons for any of the directions it gives and if it does subsequently give reasons for court proceedings, the court is not empowered to examine them.

Question no 4

The question which calls for determination is whether the exclusion of the right to be heard as provided in s 59 of the Act, in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprives the respondent of his right to livelihood is unlawful and unconstitutional in the light of the express guarantees enshrined in arts 5 and 8 of the Federal Constitution.

Section 59 of the Act states:

> No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this act or any subsidiary legislation made under the act.

Section 59 was a new section inserted by the Immigration (Amendment) 1989 (Act A 719) which came into force on 10 February 1989 and further amended by the Immigration (Amendment) Act 1997 (Act A 985) after the decision in *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, where the Supreme Court held that the appellant was not afforded an opportunity to be heard before the cancellation of the employment pass which was granted to him for two years under reg 19 of the Immigration Regulations 1963.

Abdoolcader SCJ, delivering the judgment of the court, at p 138 stated:

> In the light of the authorities we have adumbrated, we regard the appellant as so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice. ...
>
> In the event, at the conclusion of the hearing, it was clear that certiorari must go to quash the cancellation of the appellant's employment pass, and we ordered accordingly.

Indeed, the Explanatory Statement to the Bill for Act A 719 states that 'The new s 59 seeks to exclude a person from being given an opportunity to be heard prior to the Minister or the Director General making an order against him in respect of any matter under the act or any subsidiary legislation under it'. In short, s 59 in plain and clear words has excluded the audi alterem partem rule for the cancellation of the respondent's entry permit.

The primary submission of En Shafee is that the cancellation of the respondent's entry permit without the right of being heard infringed his right to livelihood which is a fundamental right guaranteed by arts 5(1) and 8(1) of the Federal Constitution and since that right has been infringed, it was urged that s 59 should be struck down for being unconstitutional.

Datuk Foo, on the other hand, submitted that the exclusion of the right to be heard under s 59 of the Act does not infringe arts 5(1) and 8 of the Federal Constitution. He said art 5 is not absolute and can be taken away by law duly passed by Parliament.

The section also does not offend art 8(1).

Let us now consider the relevant constitutional provisions.

Article 5(1) provides:

> No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8(1) provides that all persons are equal before the law and entitled to the equal protection of the law.

Article 9(2) and (3) states:

> (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.
>
> (3) So long as under this constitution any other State is in a special position as compared with the States of Malaya, parliament may by law impose restrictions, as between that State and other States, on the rights conferred by cl (2) in respect of movement and residence.

First, art 5(1) speaks of 'life' and 'personal liberty' and guarantees that a person's life and personal liberty are not to be deprived save in accordance with law.

The Court of Appeal at p 305, citing its own decisions in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481, and the Federal Court case of *Rama Chandran* held that the expression 'life' in art 5(1) is not limited to mere existence but is a wide concept and that the

words 'personal liberty' should be similarly interpreted. It went on to say that 'any other approach to construction will necessarily produce an incongruous and absurd result. For, 'life' and 'personal liberty' are both equally dynamic concepts and should be treated in like fashion.

In our view, the words 'personal liberty' should be given the meaning in the context of art 5 as a whole. In this respect, we adopt what has been said by Suffian LP in *Loh Wai Kong*. Speaking for the Federal Court, comprising five Federal Court judges in deciding whether a citizen has a right to leave the country, to travel overseas, and a right to a passport, this is what he said (at p 34):

> Article 5(1) speaks of personal liberty, not of liberty simpliciter. ... It is well settled that the meaning of words used in any portion of a statute — and the same principle applies to a constitution — depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing 'personal liberty' in art 5(1) one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except any enemy alien, freedom from being 'unlawfully detained'; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to have a passport. Indeed freedom of movement is dealt with specifically in art 9 which, however, only guarantees citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein.

We note that neither in the instant case nor in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* did the Court of Appeal refer to *Loh Wai Kong* and we cannot understand why. Unfortunately, too, in the majority judgment of the Federal Court in *Rama Chandran*, although reference was made to the Court of Appeal decision of *Tan Teck Seng* and to art 5 in the context of the expression 'life', the reference was only a brief reference and we note, too, that *Loh Wai Kong* was not cited, let alone considered by the Federal Court in *Rama Chandran*.

We therefore disagree with the Court of Appeal that the words 'personal liberty' should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life. We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Federal Constitution under 'FUNDAMENTAL LIBERTIES' viz, protection against retrospective criminal laws and repeated trials (art 7); equality (art 8); freedom of speech, assembly and association (art 10); freedom of religion (art 11); rights in respect of education (art 12) and rights to property (art 13).

We agree with the learned State Attorney General that the entry permit only allows the respondent to enter and reside in Sabah, but ipso facto the entry permit does not confer any right to livelihood to the respondent. A

We would like to add that as the respondent is not a person belonging to the state of Sabah, he could not have been accorded any right to earn a livelihood in that state. Moreover, the state of Sabah's exclusive control on immigration is enshrined in art 161 E(4) of the Federal Constitution, which we shall discuss later. At any rate, the right to set up the practice is only incidental to the right to enter and reside in Sabah. B

We were referred by the learned State Attorney General to *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors*; *PP v Yee Kim Seng*; and *Selangor Pilot Association* for the proposition that the constitutional guarantee under art 5(1) is not absolute. It can be taken away by law duly passed by Parliament. Here, we need to refer briefly to the Privy Council decision in *Selangor Pilot Association*. The Association had been carrying on the business of providing pilotage services within certain areas of the Port of Klang and they had in fact a monopoly of the business. The Port Authorities Act 1963 was amended by the Port Authorities (Amendment) Act 1972 which added two new sections, the effect of which was to prohibit the respondents from carrying on their business within the pilotage districts. The second appellant, Lembaga Pelabuhan Kelang took over the physical assets of the respondents and paid compensation for them. The respondents asked for compensation for loss of goodwill and loss of future profits but this was refused. The respondent applied to the High Court, inter alia, for a declaration that they were entitled to compensation for the goodwill of their business. Alternatively, they claimed a declaration that s 35A (added by the Port Authorities (Amendment) Act) was unconstitutional as it was inconsistent with art 13 of the Federal Constitution. The High Court dismissed the claim. The Federal Court allowed the appeal. On further appeal to the Privy Council, the appeal was allowed. Viscount Dilhorne (delivering the majority judgment of the board) stated (at pp 135–136): C D E F

> Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation, also leads to compulsory acquisition or use. G
>
> If, in the present case, the Association was in consequence of the amending Act deprived of property, there was no breach of art 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.

Similarly, in *PP v Yee Kim Seng*, it was held that art 5(1) of the Federal Constitution was not infringed because the accused was not going to be deprived of his life or personal liberty except in accordance with law. And the law in that case was the Internal Security Act 1960 which was a perfectly valid law passed by Parliament. H

In *Kulasingam*, Abdoolcader J (as he then was) said at p 211: I

> The legislature can, by clear words, exclude the principles of natural justice in the absence of specific constitutional guarantees.

It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise (*PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 at p 117; *PP v Su Liang Yu* [1976] 2 MLJ 128).

Secondly, art 8(1) provides that all persons are equal before the law and are entitled to the equal protection of the law. Equality before the law means the equal subjection of all persons to the law (see *PP v Datuk Harun bin Haji Idris* at p 117).

Thirdly, art 9(2) gives the citizen the right to move freely throughout Malaysia and to reside in any part thereof. However, these rights are subject to cl (3), which according to Andrew Harding's *Law, Government and the Constitution in Malaysia* at p 225, 'clearly refers to Sabah and Sarawak, both of which enjoy such a special position. The purpose of the qualification is to ensure that constitutional challenges cannot be brought against these states in respect of the use of their special immigration powers, which may be used to control entry from Peninsular Malaysia', see also *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia* [1979] 2 MLJ 101.

It is clear from the authorities that the constitutional rights as guaranteed under art 5(1) of the Federal Constitution can be taken away in accordance with law. Hence, s 59 of the Act, which removes the audi alterem partem rule, which was duly enacted by Parliament is valid and constitutional.

In view of the presumption of constitutionality of an Act of Parliament and here the burden of showing otherwise is on the respondent which he has not satisfied us, it is our conclusion that s 59 of the Act is valid and constitutional.

Question no 5

The question here is whether the amended s 65(1)(c) of the Act can and does operate retrospectively so as to prejudice the accrued rights of the respondent which rights as contended by the learned counsel, were available to him before the amendment. Alternatively, whether the amendment contravened the Agreement Relating to Malaysia 1963 and the Report of the Inter Governmental Committee 1962.

Previously, s 65(1)(c) of the Act read as follows:

> (1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the director shall comply with any directions given to him by the State Authority, being directions —
>
> (a) ...
>
> (b) ...
>
> (c) requiring him to *exercise any discretion vested in him to* cancel any permit, pass or certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a special person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State. (Emphasis added.)

By the Immigration (Amendment) Act 1997 (Act 985) which came into force on 1 February 1997, the words 'exercise any discretion vested in him to' were deleted.

Datuk Foo in his written submission stated that the purpose of the amendment is to remove any doubt that the director has a discretion whether or not to comply with the direction of the state authority.

Secondly, that the effect of the amendment is to make it beyond doubt that the director shall comply with any directions given to him by the state authority being directions requiring him to cancel any permit, pass or certificate issued to a specified person.

Thirdly, even without the deletion of the said words, the director has to comply with the direction of the state authority to exercise any discretion vested in him to cancel any permit, pass or certificate. According to him, the 'discretion' referred to therein does not mean he has a choice whether to comply or not to comply. The 'discretion' means the discretionary power vested in him which he must exercise to comply with the directions of the state authority. If it were otherwise, it flies in the face of s 65(1)(c) which states that the director shall comply with the direction of the state authority. Therefore, despite the deletion of the said words, there is no change in substance in the section.

We find there is much force in this argument. We agree with the learned State Attorney General that the effect of s 65(1)(c) prior to or after the amendment is still very much the same because under sub-s (1) of s 65, the director shall comply with any directions given by the state authority being directions requiring him under para (1)(c) to cancel any permit, pass or certificate issued to a specified person, etc.

On En Shafee's submission that the amendment to s 65(1)(c) cannot have any retrospective effect so as to impair the respondent's vested or accrued right and/or legitimate expectation, our view is that the amendment has no retrospective effect having regard to the fact that the amendment came into force on 1 February 1997 and the respondent's entry permit was cancelled on 12 November 1997. We agree with the learned State Attorney General that it would be unlawful for the director to avail himself of the provisions of s 65(1)(c) prior to the amendment. He had to act under the amended section.

On the question whether the respondent has any accrued right, En Shafee submitted that the respondent has a substantive right accruing to him in the form of rights enshrined in the rules of natural justice. He submitted that when the respondent was issued an entry permit in December 1995 he had an accrued right. The respondent has been continuously residing in Sabah with his wife and children. He has no intention of becoming a permanent resident outside Sabah. The Respondent's only source of livelihood is his legal practice and he has been practicing law ever since he was admitted to the Sabah Bar on 23 October 1985. Therefore, he has the right to livelihood in Sabah, which is one of the fundamental liberties guaranteed under Part 11 of the Federal Constitution.

In reply, the learned State Attorney General submitted that the respondent has no accrued rights acquired under the entry permit. We agree with him. We had in fact dealt with this point under question no 4 when we hold that the entry permit only allows the respondent to enter and reside in Sabah for two years lawfully, and the entry permit does not confer any right to livelihood to the respondent. Neither the personal affairs relating to his family nor his legal practice are accrued rights conferred by the entry permit.

Encik Shafee further submitted that the respondent has a legitimate expectation of being accorded rights in compliance with the principles of natural justice and which includes expectation which go beyond enforceable legal rights, provided they have some reasonable basis.

In our view, the respondent could not be said to have any legitimate expectation that his entry permit would not be cancelled given the express provision under the Act that such entry permit may be cancelled at any time. In addition, there was no promise or representation made by the state authority that his entry permit would not be cancelled (see *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] 1 AC 374).

On the constitutionality of the amendment to s 65(1)(c). Encik Shafee contended that the amendment was not in compliance with art 161 E(4) read with art 161 E(2) of the Federal Constitution because there was no concurrence of the Yang di-Pertua Negeri of Sabah to the said amendment.

In reply, Datuk Foo submitted that art 161E(4) does not apply to the amendment to s 65(1)(c) of the Act since the amendment does not impinge upon the rights and powers of the State of Sabah or Sarawak.

Article 161 E(4) reads:

> In relation to any rights and powers conferred by the federal law on the Government of the State of Sabah and Sarawak as regards entry into the State and residence in the State and matters connected therewith ... cl (2) shall apply ...

Clause (2) of art 161E states that no amendment shall be made to the Federal Constitution without the concurrence of the Yang di-Pertua Negeri of Sabah or Sarawak if the amendment is such as to affect the operation of the Federal Constitution as regards any of the following matters:

(a) Malaysian citizenship and the equal treatment of persons born or resident in the state;

(b) the constitution and jurisdiction of the High Court in Sabah and Sarawak, and the appointment, removal and suspension of its judges;

(c) the state's legislative and executive powers and financial arrangements between the Federal and the state;

(d) religion and language in the state; and the special treatment of natives of the state; and

(e) the quota of Members of Parliament allocated to the state in proportion to the total number of members of the House of Representatitves.

It was submitted that the amendment to s 65(1)(c) does not fall under any of the five matters enumerated above. The amendment to s 65(1)(c) merely took away the discretion vested in the director in complying with the directions of the state authority. The amendment does not in any way affect the rights and powers of the state as regards immigration matters. As such there is no requirement for compliance with art 161(E)(2) and art 159(3) of the Federal Constitution.

We agree with Datuk Foo's submission. We are of the view that the spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter Governmental Committee has not in any way been contravened. Encik Shafee has not shown to our satisfaction that the amendment is unconstitutional and since it is trite that a statute is always presumed constitutionally valid until proved otherwise (*PP v Datuk Harun Haji Idris*), we therefore rule that the amended s 65(1)(c) of the Act is valid.

For the record, Dato' Zaitun Zawiyah, Senior Federal Counsel, who appeared for the director, supported the submission of the learned State Attorney General. On the issue of 'morality' in s 9(1)(c) of the Act, she however agreed with the Court of Appeal that it referred to public morality and not private morality. In our view, this cannot be so as unlike the words 'order', 'security' and 'health' appearing before it in that same paragraph, the word 'public' has not been used for 'morality'.

Conclusion

We have answered the five questions of law at the end of each question in numerical order. For reasons stated, we make the following orders in respect of these appeals:

(1) for Appeal No 01–1–99(S), the appeal is allowed with costs. The order of Ian Chin J, made on 26 December 1997 is upheld. The deposit shall be refunded to the appellant;

(2) for Appeal No 01–2–99(S), we dismiss the appeal with costs. The deposit shall be paid to the state authority to account of taxed costs.

Lastly, we would like to place on record that the presiding judge of these appeals was the Chief Judge of the High Court in Malaya, who before the completion of this judgment passed away on 24 December 2001. In the light of s 78 of the Courts of Judicature Act 1964, I have shown this judgment in draft to my learned brother, Abdul Malek Ahmad FCJ, who has agreed with it.

Order accordingly.

Reported by Peter Ling